The Commission's decision granting our Petition was extraordinarily eloquent in underscoring that fairness in employment is a measure of one's character. Although many thought this holding to be controversial at the time, it correctly underscored the fact that equal opportunity is, at bottom, a moral issue, irrespective of any economic considerations.

However, a number of farsighted broadcast executives came to realize that ending discrimination and its present effects had profound economic implications. They appreciated that the underutilization of minorities and women imposed tremendous economic burdens on the broadcasting industry, while the full inclusion of all talented Americans in the broadcasting industry was fundamental to the industry's competitiveness and economic health.

How unfortunate that over the past 25 years, the National Association of Broadcasters has not grasped this basic economic fact. Fortunately, some of the NAB's most respected members have taken a stand opposite to the NAB. Thomas Murphy and Daniel Burke of Capital Cities Communications, and Donald McGannon of Group W, were ahead of their time in deciding to carry on EEO programs that delivered far more value than the EEO Rule required. As a result, their companies became beacons for talented minorities and women whose skills were ignored elsewhere. Their companies prospered tremendously and deservedly.

These far-seeing leaders never saw EEO compliance as a "burden." They understood that inequality of opportunity was the real "burden" on society, on all businesses and on the broadcasting industry specifically. They appreciated the fact that strong EEO programs create stronger companies by expanding the size of a company's labor pool, thereby reducing the inefficiencies which obtain when some segments of the labor pool are underutilized.

Furthermore, they understood that in a television or radio station, workplace dialogue among a diverse group of creative people inevitably expands the diversity of viewpoints which are broadcast. Consequently, strong EEO programs enable broadcasters to reach out to new markets they might otherwise not choose to reach -- or know how to reach.

I respectfully submit that if a radio or television station receives only a fraction of a rating point from the pro-competition impact of workplace diversity, the revenues flowing from that increased viewership or listenership would far, far offset the miniscule costs of the telephone calls, e-mails and faxes used for EEO recruitment and the file drawer space consumed by EEO record keeping.

Over the past forty years, I have learned that a poor EEO program is typically a symptom of a poorly run broadcasting station. It is a dirty secret in the industry that companies looking to buy stations know that among most desirable targets are those with the worst EEO records! By artifically restricting its applicant searches to sources which generate few minority or female applicants, such a station may never connect with and hire the best available talent. Worse yet, the station has effectively written off entire segments of its potential audience. Because the station is being operated inefficiently, it draws suboptimal cash flow, enabling a buyer to purchase it for much less than its intrinsic value. The buyer can then turn the station around and make a healthy profit by operating it on an equal opportunity basis.

It is no accident that the most successful broadcasters are not the companies lobbying for the cutbacks in civil rights enforcement to which the Commission has bestowed the misleading name "EEO Streamlining." Many successful broadcasters, who recognize the economic value of EEO, are actually grateful when a public interest organization files an EEO complaint against one of their stations. Why is this? Because large companies' CEO's often find themselves to be insulated by layers of bureaucracy from station general managers. A CEO may lack the personal time to keep track of middle management's EEO compliance efforts. Thus, he is not offended by the occasional public interest group EEO complaint which draws his attention to an underperforming unit within his company.

> For some companies, EEO compliance is moderately strong medicine -- as it was for Group W and CapCities in the early days. But every patient is thankful later for medicine which makes her health more robust. Surely, some broadcasters will grumble briefly if the Commission sets out seriously to end discrimination and its present effects by the 100th anniversary of broadcasting, as the National Council of Churches, the Office of Communication of the United Church of Christ, the Minority Media and Telecommunications Council and others have urged. But the FCC must do this, for the moral strength and the optimum financial health of the industry depend on it.
>
> I urge the Federal Communications Commission to take a farsighted view of the basic question in this rulemaking proceeding: What is a "burden?" Ending discrimination and its present effects will do far more than any of the short-sighted proposals in the NPRM to "reduce burdens on broadcasters." The time has come for the Commission to lift permanently from broadcasters the burden of economic inefficiency generated by inequality of opportunity.

EEO compliance is essential to the long term financial and moral health of the broadcasting industry -- and the nation. If the broadcasting industry fully understood this, it would insist upon a strong federal program to sanction EEO violators, and it would undertake significant EEO promotion efforts on its own irrespective of whether these steps would garner favor with the Federal Communications Commission.

* * * * *

D. Reductions in EEO enforcement would impose considerable burdens on everyone engaged in broadcasting except EEO violators

The NPRM had much to say about alleged "burdens" on (nonminority) broadcasters. Yet it is amazing that the NPRM displays no recognition of the obvious fact that an action which reduces the costs on one entity frequently increases costs or shift "burdens" onto other entities. For example, in its discussion of whether to exempt thousands of broadcasters from EEO recordkeeping requirements, the NPRM states:

> We specifically request comment on whether these stations would be disadvantaged by the lack of recordkeeping requirements. By what mechanism could a broadcaster, exempt from recordkeeping requirements, demonstrate its compliance with the EEO Rule in the event of a prima facie challenge by a petitioner?

NPRM, 11 FCC Rcd at 5166 ¶23.

It is difficult to conceive of more one sided language than this. The NPRM's concern that a broadcaster might be disadvantaged if challenged is not balanced by recognition of a far more obvious question: how in the world can a petitioner bring a meaningful challenge, or prosecute its challenge in a Bilingual investigation or in a hearing, if no data is available upon which to base or advance such a challenge? How indeed -- unless the station's personnel director is fired, steals incriminating personnel memoranda and lays them on the doorstep of a petitioner?

We raised this question in our April 11, 1996 Petition for Reconsideration and Clarification. Id. at 3 n. 3. Unfortunately, in ruling on that Petition, the Commission was silent on whether the NPRM's proposals imposed burdens on anyone but (nonminority) broadcasters. See Order.

An agency cannot refuse to consider material contentions in any proceeding. See pp. 25-26 n. 38 supra. In addition, when faced with an argument that a rulemaking proposal shifts burdens or imposes new ones, the Commission must comply with the requirements of the Regulatory Flexibility Act of 1980 ("RFA"), as recently strengthened by the Small Business Regulatory Enforcement Fairness Act of 1996 ("Fairness Act").135/

Section 603 of the RFA, 5 U.S.C. §603 (1996) requires an agency to provide, inter alia, "where feasible, an estimate of the number of small entities to which the proposed rule will apply" and "significant alternatives to the proposed rule on small entities" such as "differing compliance or reporting requirements...that take into account the resources available to small entities[.]" Section 607 of the RFA, 5 U.S.C. §607 (1996) states that "an agency may provide either a quantifiable or numerical description of the effects of a proposed rule..., or more general descriptive statements if quantification is not practicable or reliable." Errors in an Initial Regulatory Flexibility Analysis ("IRFA") are remediable on judicial review of the whole record, 5 U.S.C. §611 (1996).

This proceeding's IFRA, found in the NPRM, 11 FCC Rcd at 5183, utterly fails to comply with the requirements of the RFA.

135/ The goal of the Fairness Act is to "provide targeted relief to small businesses, small entities such as townships, counties, and cities, and not-for-profit organizations who feel overwhelmed by Government regulation (emphasis supplied)." Remarks of Senator Bond, 142 Cong. Rec. §2309-10, 2321 (1996). Thus, the Fairness Act applies to a wide range of "small entities" engaged in the stream of the broadcast personnel and equal employment process.

The NPRM's IFRA states that the proposals in the NPRM "could affect all licensees, including those that qualify as small business entities." Id. However, the IRFA nowhere mentions that the proposals in the NPRM would profoundly disadvantage a wide variety of non-licensees, including Black colleges, community groups which supply job candidates, discrimination victims, individual job applicants, petitioners to deny, and broadcast listeners and viewers. Specifically, the NPRM's IFRA fails to mention the limited resources available to each of these parties in meeting the significant burdens which would be imposed on them by a cutback in EEO enforcement. As such, the NPRM's IFRA disregards thirty years of jurisprudence recognizing that broadcast regulation is not a private affair involving only the government and the broadcaster. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I").

Furthermore, the proposals in the NPRM would also disadvantage many licensees, including minority broadcast station owners, Black colleges whose broadcast programs operate noncommercial broadcast training facilities, and broadcasters innocent of discrimination.136/

Set out below is a discussion of how a cutback in EEO enforcement would burden several small entities protected by the RFA and the Fairness Act.

136/ The fact that many broadcasters are burdened by proposed cutbacks in EEO resolves any doubt whether proposals for stronger EEO enforcement are within the scope of the NPRM. See discussions of the scope of this proceeding at 3 n. 3 and 107-108 n. 131.

1. Minority broadcast station owners

EEO deregulation would hurt minority owners -- who are exceptional EEO compliers[137/] -- by shifting the expense of training to them and reducing the pool from which they hire. Thus, it rewards discriminators and punishes EEO compliers by shifting the cost of remedying decades of discrimination onto those who least deserve to bear more of it, or can least afford it.

James L. Winston, Executive Director and General Counsel of the National Association of Black Owned Broadcasters, states in his Declaration (Exhibit 5 hereto):

> Black owned broadcasting stations are proud to be the very best EEO "supercompliers" in the industry. To the best of my knowledge, not one of the approximately 200 Black owned broadcasting stations has ever received any kind of EEO sanction. Also, to the best of my knowledge, none has ever been the subject of an FCC EEO Branch staff investigation pursuant to Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978). In no segment of the industry do minorities have a better chance for career development than in Black owned broadcasting stations.

137/ See Honig (finding, for example, that among Black formatted stations, 72% of the Black owned stations' management employees were Black but 38% of the White owned stations' management employees were Black).

The FCC's NPRM on "EEO Streamlining" identifies the parties in need of relief from "regulatory burdens" as "broadcasters." The NPRM would have been more accurate had it more specifically referred to "certain nonminority broadcasters." Since becoming Executive Director of NABOB in 1982, I have heard Black station owners identify numerous critical concerns: lack of access to capital, discrimination by financial institutions, discriminatory audience measurement methods by ratings services, discrimination by advertisers, the loss of the FCC's tax certificate policy, the continuing erosion of the Commission's multiple ownership rules, and many others. I have never heard a Black station owner identify EEO compliance or recordkeeping responsibilities as a burden which requires Commission "streamlining."

EEO compliance is not a burden for Black station owners, because we are usually sought out by young minority persons seeking to enter the business. Black owned stations are very frequently the first point of entry for African Americans and other minority persons seeking to break into broadcasting, but we cannot hire and train all of the minorities seeking to enter this business. Black station owners see effective EEO enforcement as an important impetus for creating the trained African American talent for the growth of Africam American ownership. If the Commission does not continue to require nonminority owned stations to hire, train and promote minorities, there will be an inadequate pool of experienced media professionals to move up into key management positions at our stations or to become owners themselves.

That is why NABOB was delighted to see that the NPRM recognized that "employment discrimination in the broadcast industry inhibits our efforts to diversity media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs." NPRM, FCC 96-49 (released February 16, 1996) at 3 ¶3.

Intense competitive pressure has been placed on Black station owners by last year's loss of the tax certificate policy and by the multiple ownership provisions in the Telecommunications Act. These developments have created a substantial risk that we may lose many of our stations.

Thus, NABOB is quite dismayed that the FCC would even consider any material cutbacks in EEO enforcement. We recognize that the FCC has framed the issue as whether "burdens" on broadcasters can be eased while "maintaining effective industry EEO oversight." NPRM at 10 ¶17. But it is not enough merely to "maintain" EEO oversight, given the high level of discrimination which continues to infect the industry we love. Instead, the FCC should be soliciting proposals to make EEO enforcement much more effective than it is now.

The Regulatory Flexibility Act requires the FCC to identify any "burdens" on any "party" as part of any notice of proposed rulemaking. The EEO Streamlining NPRM is incomplete at best, since Black owned broadcasters will be profoundly burdened by any cutback in EEO enforcement:

- Nonminority broadcasters will have even less of an incentive to train African Americans and other minorities for broadcast careers. This responsibility -- and the attendant costs -- will fall even more heavily on Black owned broadcasters, who will always do more than our share of this training.

- The pool of African American professionals available to us when we wish to hire experienced African American managers of our stations will become even smaller than it is now.

- The number of African Americans with top management experience transferable to entrepreneurship will decline over time, yielding an even smaller pool of future African American station owners.

Each of these burdens will translate into comparatively lower profit ratios for our stations than similarly situated White owned stations -- thereby increasing the already intense pressure exerted by investors and financial institutions who wish to have our members sell their properties. By omitting any mention of these burdens on Black owned broadcasters, the NPRM almost surely violates the Regulatory Flexibility Act.

> Worse still, the "small" and "small market" stations targeted by the NPRM are precisely the stations which many Black owners view as their primary competitors. Most Black owned stations are themselves small stations, and a disproportionate number are situated in small markets. By excusing our direct competitors from EEO responsibilities, the FCC will comparatively disadvantage Black owned broadcasters.
>
> Finally, I am troubled by the NPRM's failure to seek proposals on how to reward truly outstanding EEO compliance. Ministerial EEO compliance may be "good business" but the kind of truly exceptional EEO performance typical of Black owned stations is seldom justifiable purely on financial grounds; indeed, it has generally been its own reward. After the loss of the tax certificate policy, Black station owners are in desperate need of a regulatory initiative which will attract investment dollars to them, attract new station purchase opportunities to them, and attract the best qualified industry professionals to them. While the NPRM does propose some kind of exemption of stations with "good numbers" from some reporting requirements, that is not what Black broadcasters really want at all. We don't have any distaste for EEO procedures. What we need is a reward, with real economic value, for EEO performance above and beyond the call of duty.

Mateo Camarillo, President of O.N.E., Inc. and a media investor with interests in six radio stations in California, states in his Declaration (Exhibit 6 hereto):

> With the death of the tax certificate policy, it has become infinitely more difficult for Hispanic media entrepreneurs to receive startup or acquisition financing. Before 1995, most minority station deals were predicated on the existence of the tax certificate policy, which I have utilized in the past. Now it's all we can do to hold onto what we've already acquired.
>
> On top of this, the FCC's proposal to cut back on EEO enforcement is especially hard to swallow. We're being kicked when we're down.

> As a media investor, I have dealt regularly with broadcast station brokers. Some of them are excellent and their contributions to the industry are surely considerable. But I never cease to be amazed at how some of them stereotype Hispanics as being interested only in owning Spanish format stations.
>
> Brokers' perspective on Hispanic entrepreneurs is limited because they've had no exposure to the views of Hispanic employees. It should trouble the FCC that to this day there is only one minority broadcast station broker, and he's an independent. Not one White broker has ever trained even one minority broker.
>
> In personality, social commitment and operating philosophy, broadcast brokers are very similar to most station owners. Broadcast brokering requires no college degree or any great genius.
>
> Thus, if broadcast EEO enforcement is reduced or terminated, we can expect the broadcast industry's workforce -- especially radio stations' workforce -- to come to resemble the broadcast station brokerage business.
>
> Hispanic broadcast station owners depend on a pool of well trained minority talent, including especially Hispanic talent, to share their cultural perspectives and diversify the broadcast content of their stations. If Anglo station owners need not hire and train Hispanics, Hispanic station owners will have to do all of the management development for Hispanics in-house on our limited budgets. On top of that, we will still find ourselves bearing the costs of training Hispanics who are then hired away by our Anglo competitors. Why should Anglo stations train Hispanics if (1) broadcasters are no longer required to do training for EEO purposes and (2) Anglo broadcasters can easily steal good Hispanic employees from Hispanic owned stations, and let the Hispanic owners bear the costs of training?
>
> Thus, Hispanic station owners should have been identified in the FCC's Notice of Proposed Rulemaking as an additional party "burdened" by any reduction in EEO enforcement.

Dorothy Brunson, Chair of the Association of Black Owned Television Stations, states in her Declaration (Exhibit 7 hereto):

> The nation's 31 minority owned television stations have never had the slightest quarrel with the FCC's EEO Rule. It doesn't "burden" us in the least; indeed, it helps us by making available to us a wide range of trained talent who we'd otherwise have had to train ourselves.
>
> Thus, I cannot understand why the FCC considers those "burdened" by EEO to be <u>all</u> broadcasters; apparently, it wasn't thinking of us. I cannot understand why the FCC would consider reducing EEO responsibilities for the stations at which most people in our industry begin their careers. I cannot understand why the FCC, which professes to be concerned with the maintenance of its minority ownership policies and with diversity, is so eager to cut back on the <u>only</u> remaining pro-diversity protection found anywhere in its rules and policies. After nearly 40 years in this business, I simply do not understand it at all. I certainly never expected this from President Clinton's FCC.
>
> I doubt I'll ever truly retire. But when and if I ever do, I would like to be able to sell my station to another African American and thus "keep it in the family." I have worked far too hard to make WGTW-TV a success to sit back and watch as the Black community loses it. But if the FCC makes it more difficult for Black people to develop careers in this business, how in the world am I going to find someone Black and experienced to buy my station?
>
> [If] a broadcast license means anything at all, it means that the owner is committed to taking aggressive and pro-active steps to bring all Americans into the mainstream of communications. The FCC would be well advised not to cheapen a broadcast license by eviscerating EEO enforcement in the name of "reducing burdens" on a few insensitive and anti-social licensees.

2. <u>Black colleges</u>

Black college communications programs did not exist before the EEO Rule was adopted. College trustees would not create programs whose students could not become employed.

A cutback in equal opportunity threatens the viability of all of these programs and the existence of many of them, whose graduates depend most heavily on jobs in smaller stations or in small markets. An EEO cutback would be especially unfair to currently enrolled students and recent graduates, who in good faith invested years of hard work in the hope of developing a career.

Furthermore, many Black colleges are broadcasters themselves, operating noncommercial stations (carrier current and full power) as training facilities.138/ These stations would face extraordinary budget pressure in the event of an increase in discrimination for two reasons. First, many of them depend heavily on general market broadcasters to provide in-kind assistance such as engineering, equipment, student mentoring and joint internships. Second, many of them would find it difficult to justify continued operations if their trainees cannot build careers upon graduation.

Dr. James Hawkins, Chair of the Black College Communications Association, states in his Declaration (Exhibit 8 hereto):

> I note that the FCC's Notice of Proposed Rulemaking on "EEO Streamlining" speaks of "broadcasters" as the group which suffers "burdens" in need of regulatory relief. I am disturbed, though, that the Notice of Proposed Rulemaking says not one word about the burdens an EEO enforcement cutback would impose on other parties besides White broadcasters -- including Black colleges and universities, Black students seeking to make good on their years of work in obtaining a broadcasting education, and Black broadcasting professionals who will suffer a heightened level of job discrimination.

138/ E.g., WDCU-FM (University of the District of Columbia), WHBC-FM (Howard University (carrier current)), WCLK-FM (Clark-Atlanta University), WFSS-FM (Fayetteville State University), WEAA-FM (Morgan State University), WESM-FM (University of Maryland Eastern Shore), WJSU-FM (Jackson State University), and KPVU-FM (Prairie View A&M University).

Most of the Black college broadcasting programs came into existence after -- and large part <u>because</u> -- the FCC adopted its EEO Rule in 1971. The first such program, at Howard University, was created that year. <u>No</u> such program existed before 1971, because unchecked discrimination in the industry was so extensive before that time that it would have been absurd for Black college administrators to assure Black college broadcasting graduates that broadcasting careers awaited them.

One of our primary objectives as educators is "mainstreaming" our students. "Mainstreaming" means insuring that the students have access to state of the art equipment and broadcasting techniques, and insuring that the students do not artifically restrict themselves to working only at Black-formatted stations. In order to fulfill this mainstreaming objective, each Black college broadcasting program relies very heavily on internship programs at FCC-licensed facilities. Thus, any cutback in EEO responsibility will result in the disappearance of many of the best training opportunities presently open to Black broadcasting students. Inevitably, a cutback in internship opportunities will impose on the Black colleges considerable new burdens and costs attendant to providing in-house practicum experiences for their students.

Equal opportunity in broadcasting is still a fairly new concept. Most of those who entered the industry in the 1970's (the first decade of FCC EEO enforcement) have yet to attain ownership and senior management positions in broadcasting companies. Therefore, this year's class of Black college graduates still lacks access to any significant networking and alumni support from Black broadcasting managers with hiring authority. It will probably take another generation of strong FCC EEO enforcement before the networking opportunities typically enjoyed by White students are available to our students.

Even today, after a generation of FCC EEO enforcement, roughly two thirds of the graduates of Black college broadcasting programs are still unable to find jobs in their chosen field. It is difficult to overstate the burdens on our graduates from a reduction in the already crabbed career opportunities available to them. Having devoted four years of hard work to securing a broadcasting degree, Black broadcasting students have foreclosed to themselves the opportunity to enter a more traditional and "safe" field such as teaching. This career choice is not made lightly by our students: it is made in reliance on the FCC's promise that the broadcasting industry -- although virtually foreclosed to Black people from 1920 to 1971 -- would open its doors and welcome us.

If Black colleges cannot promise their students that jobs might be available to them upon graduation, the very premise for the existence of Black college broadcasting programs will have evaporated. Even a slight reduction of opportunity for our graduates would threaten the very existence of many Black college broadcasting programs and would significantly burden all of them. Even the surviving programs would have to commit far greater resources to recruitment and placement, thereby further straining the budgets of the colleges' academic programs.

We are particularly troubled by the FCC's proposal to exempt "small" and "small market" stations from meaningful EEO obligations. These "small" and "small market" stations are the very stations at which most Black college graduates begin their professional careers. Although our entering freshmen typically aspire to careers at large stations in large markets, <u>every</u> broadcasting teacher at a Black college must repeatedly stress to students that large stations, and stations in large markets, seldom hire college graduates without fulltime industry experience unless the students are related to the owner or manager.

> Black colleges' placement and alumni programs are specifically tailored to opportunities at "small" stations and stations in "small" markets. Indeed, our advice to students is that they must be willing to sacrifice their social lives and be ready to go to Montana to work after graduation -- if that's where the jobs are. We repeatedly emphasize to our students that they must start "small" and work their way up.
>
> The FCC's EEO rules and policies have been the single most critical factor in promoting equal employment opportunity for people of color in the broadcasting industry. Opportunities for Black students seeking to enter this business continue to be far too scarce, compared to opportunities for similarly situated and similarly educated White students. Consequently, the FCC should dramatically strengthen its EEO enforcement effort, and set a goal of eliminating discrimination from broadcasting, root and branch, in the near and foreseeable future.
>
> The Black College Communications Association is shocked and dismayed that the FCC would even think of cutting back on EEO enforcement at this time.

A reduction in industry EEO compliance will burden private minority training programs in much the same way that it would burden Black colleges. Sharon Pearl Murphy, Executive Director and Operations Manager of Washington, D.C.'s African American Media Incubator (AAMI), a training school endowed by Infinity Broadcasting, states in her Declaration (Exhibit 9 hereto):

> AAMI, founded in 1995...is the nation's first African American broadcast training school. In June, 1996, AAMI graduated its first class of eight students. Our enrollment stands at 20 students and is growing rapidly.

AAMI, which is open to members of all races, was created to offer training and job placement primarily for African Americans and other minorities in the radio industry. Thus, AAMI affords opportunities for those who otherwise would not receive such specialized training and access to viable jobs in broadcasting. AAMI provides a valuable career development option for those who wish to learn a broadcasting trade but cannot afford the tuition and fees to attend a college or university school of communications.

In addition, we hold community seminars to train African American owned businesses to use radio advertising effectively. We recognize that when radio stations begin to see African American owned businesses as an attractive market for airtime, the stations will treat African American job candidates more seriously and will begin to cover issues critical to the African American community with greater depth and sensitivity.

The viability of AAMI will depend upon the industry's commitment to provide equal opportunity. If history is any guide, that commitment obtains most readily when the FCC enforces its EEO Rule vigorously.

The FCC's proposal to exempt "small" or "small market" stations would hit African Americans and other minorities particularly hard. Our graduates often receive employment in "small" stations because these stations require less experience than larger stations and thus are more likely to provide job opportunities to those just entering the industry. We advise our students that they must be willing to sacrifice and go to "small stations" or "small markets" -- if that's where the jobs are. We emphasize the importance of starting "small" and working one's way up.

If AAMI is unable to assure its students that jobs might be available to them upon graduation, the very premise for AAMI's existence will disappear.

3. Community groups which supply job candidates

Community groups assisting minorities and women in obtaining employment incur exceptional costs as a consequence of discrimination. They must advise job seekers on how to avoid discrimination, and they must devote more effort to placing each job candidate if doors are arbitrarily closed to some of them.139/

The FCC's EEO enforcement programs relies very heavily on community groups to serve as sources of job referrals; indeed, the use of those referral sources is the principal component of the efforts-based review which has been in effect since 1987. Broadcast EEO - 1987, 2 FCC Rcd at 3967.

Eduardo Peña, Communications Counsel and past National President of LULAC, states in his Declaration (Exhibit 10):

> Every FCC order imposing a conditional renewal on a broadcaster contains a footnote suggesting that the broadcaster contact local units of minority and women's organizations to obtain their assistance in identifying qualified candidates for employment. See, e.g., Newport Broadcasting, Inc. (WADK/WOTB, Newport, Rhode Island), FCC 96-96 (released March 29, 1996) at 4 n. 12 (naming the National Hispanic Media Coalition, American Women in Radio and Television and the National Urban League). These organizations are truly the FCC's and EEO-sensitive broadcasters' silent partners in EEO compliance.

139/ EEO job sources are aggrieved by employment discrimination in much the same way that fair housing organizations are aggrieved by housing discrimination. Because of housing discrimination, fair housing organizations incur extraordinary costs in advising home-seekers on how to avoid discrimination. Moreover, when home-sellers discriminate, fair housing organizations must work harder to find homes for their clients. Havens Realty v. Coleman, 455 U.S. 363 (1982).

Regrettably, it's inevitable that a cutback in EEO enforcement by government agencies leads to an increase in discrimination. No amount of jawboning will convince someone with a propensity to discriminate that the government's intentional action removing a protection against discrimination is not a signal that the government considers discrimination to be a low priority. Anyone doubting this need only study the history of the EEOC under the leadership of Eleanor Holmes Norton and J. Clay Smith, and compare it with the history of the EEOC under Clarence Thomas.

Thus, an increase in discrimination will lead to a reduction in demand for Hispanics in broadcasting, and a reduction in invitations, sent by broadcasters to Hispanic organizations, for referrals of applicants for specific job openings. Organizations such as local LULAC councils will thus be at a severe disadvantage when a qualified person comes to them for assistance in securing broadcast employment. Instead of being able to refer to routine postings of specific jobs, LULAC councils will have to telephone the placement directors of each station to ask them, one by one, if they have a job open. This is profoundly inefficient and expensive. It's patently unfair to expect volunteers to do this.

Furthermore, the absence of meaningful Form 396 information will make it impossible for a local community organization to make an informed judgment as to which broadcasters are making a genuine effort to seek out and employ minorities. Presently, local organizations benefit enormously by knowing which broadcasters are, and which are not, equal opportunity employers. Local organizations do not waste time sending minority job seekers on a fool's errand to visit employers uninterested in hiring minorities. Without Form 396 data, how is a community group to know which broadcasters are, and which are not, promising sources of jobs for minority candidates?

Consequently, the increase in discrimination likely to result from a cutback in EEO enforcement, and the elimination of Form 396 data, will each impose very significant burdens on job referral organizations.

4. Discrimination Victims

It is virtually self-evident that a cutback in EEO enforcement will create more discrimination victims and aggravate the extent of the discrimination suffered by many of them.140/

Eduardo Peña, states in his Declaration (Exhibit 10 hereto):

> As the EEOC's past Director of Compliance (1970-1979), I know that the absence of any meaningful EEO compliance data renders it virtually impossible for a civil rights enforcement body to identify likely discriminators and hold them accountable. Discrimination victims are usually unaware that they are discrimination victims. Employers hardly advertise this fact. Thus -- quite apart from the fear of retaliation infecting the labor force in a relatively tight-knit industry -- it's not surprising that there are few individual complaints of discrimination against broadcasters. But today, if someone suspects that she has been discriminated against by a broadcaster, she can at least examine the station's public file and review Form 395 and Form 396. From these documents, a person suspecting that she might be a discrimination victim can at least get a sense for whether the EEO activity the licensee says it undertakes is realistically tailored to the job market and to the station's labor requirements. If referral sources are identified in Form 396, the person suspecting discrimination can call those organizations as references to determine whether the licensee has been genuine and consistent in its dealings with the referral source. This research will often enable a person suspecting discrimination to either realize that her suspicions are justified or, on the other hand, realize that her suspicions are unwarranted and that any adverse employment actions she has experienced are likely due to nondiscriminatory factors.

140/ A five employee station size cap is implicit in the FCC/EEOC Agreement's delegation to the FCC of the task of handling complaints the EEOC is unable to handle, including those at stations with between five and fourteen employees. Id., 70 FCC2d at 2331, Appx. §III(a). If the FCC raises the cap above five, it will create a new class of stations covered by neither the FCC nor the EEOC. Thus, the FCC cannot raise the station size cap without first renegotiating the FCC/EEOC Agreement.

> In this way, the existence of Form 396 helps discrimination victims decide whether to proceed, and helps innocent broadcasters avoid needless and unfortunate EEOC charges or FCC complaints.
>
> Without any meaningful information on Form 396, no person suspecting that she is a discrimination victim will have any independent basis for evaluating whether she is in fact a discrimination victim. Moreover, a genuine discrimination victim complaining to the EEOC or the FCC will have little evidence with which to make out a case, and the EEOC or FCC will have little basis for determining whether the licensee is discriminating. Thus, the evisceration of Form 396 will profoundly burden discrimination victims. (fn. omitted).

5. <u>Individual job applicants</u>

Discrimination artifically decreases the supply of jobs accessible to minorities and women. Discrimination requires minority and female job candidates to spend longer hours seeking employment, compels them to face rejection more frequently, forces them more readily to relocate to other communities in search of employment, and often gives them no choice but to accept positions with reduced responsibilities, influence, pay and benefits. Many will have to abandon hope of being employed in their chosen industry altogether.

Eduardo Peña states in his Declaration (Exhibit 10):

> Individuals seeking employment through community organizations are likely to waste considerably more time in job searches if EEO enforcement is reduced. Owing to greater discrimination, minorities will spend more time and effort filing useless job applications. And when minorities use the resources of a community group to sharpen their search for a job, they will find those community groups less aware of which specific jobs are open at which stations, and of which stations are generally uninterested in hiring minorities.

> By making the process of seeking a job in broadcasting more difficult, expensive and time consuming for minorities, and by reducing the number of jobs available to minorities, the Streamlining NPRM will discourage minorities from seeking employment in broadcasting and will profoundly increase the time and cost burdens on those minorities who do wish to continue to seek employment in broadcasting.

6. Petitioners to deny

Extensive and routine on-site investigations of broadcasters by the government would be overly intrusive as well as expensive. Consequently, the Commission has always relied heavily on civil rights organizations to bring instances of EEO violations to its attention.141/ The organizations which have filed the most EEO challenges -- LULAC, the NAACP, the National Rainbow Coalition, Operation PUSH, and the Office of Communication of the United Church of Christ -- are each signatories to these Comments. Their constituencies include millions of persons protected by the EEO Rule and hopeful of receiving diverse program service. See NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

The NPRM "specifically request[s] comment on whether these stations would be disadvantaged by the lack of recordkeeping requirements. By what mechanism could a broadcaster, exempt from

---

141/ The D.C. Circuit has observed that "[t]he Commission of course represents and indeed is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees. Moreover, the Commission has always viewed its regulatory duties as guided if not limited by our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life. The Commission view is that we have traditionally depended on this public reaction than on some form of governmental supervision or 'censorship mechanisms.'" UCC I, 359 F.2d at 1003. See also Nondiscrimination - 1976, 60 FCC2d at 230.

recordkeeping requirements, demonstrate its compliance with the EEO Rule in the event of a prima facie challenge by a petitioner?" Id., 11 FCC Rcd at 5166 ¶23. However, the Commission has not also asked how a petitioner could possibly bring a prima facie challenge in the first place without data to back it up. Thus, the Commission has committed the same error the court had to correct in UCC I -- treating public interest organizations as interlopers in a private affair between the Commission and the broadcaster.

Eduardo Peña states in his Declaration (Exhibit 10):

> The FCC relies almost entirely on petitioners to deny as its early warning system -- indeed, its only warning system -- that a broadcast licensee might be violating Commission rules. The number of FCC EEO investigations conducted on its own motion in the past decade which led to sanctions against a licensee can be counted on the fingers of two hands. However, dozens of broadcasters have been admonished or sanctioned as a result of petitions to deny. Every one of the ten hearings designated by the FCC since 1971 in EEO cases resulted from a petition to deny.
>
> Thus, petitioners to deny truly stand in the role of good samaritan witnesses whose role is essential to the Commission's exercise of its responsibility, under Section 309 of the Communications Act, to make an informed and affirmative determination that a grant of an application would serve the public interest.
>
> Petitioners to deny are already at a profound disadvantage in attempting to prove discrimination. Broadcasters seldom admit that they discriminate, although obviously many of them do it routinely. But at license renewal time, the only information available to members of the public who might wish to draw inferences about who may be, and who probably is not discriminating are the raw employment data on Form 395 and the EEO programs on Form 396.

In reviewing this information, petitioners to deny usually guess right: the vast majority of petitions to deny are granted at least in part. But it is a rare case which is designated for hearing. That is because petitioners to deny lack any opportunity for meaningful discovery, and are faced with the extraordinary requirement that petitioners essentially prove intentional discrimination just to get a hearing -- a virtual impossibility without access to the testimony of witnesses.

The elimination of Form 396 for many broadcasters -- or the reduction in the already sparse information to be contained in Form 396 -- will leave petitioners to deny unable to guess, with any degree of accuracy, which broadcasters might be EEO violators. For example, if a petitioner to deny does not know whether a renewal applicant interviewed or hired minorities, how in the world will the petitioner know whether the applicant might be discriminating?

Furthermore, once petitioners to deny are forced to rely on just the raw numbers in Form 395 as a tool for deciding whose EEO bonafides should be tested, it's inevitable that EEO opponents will allege that petitioners to deny really advocate a quota system. Petitioners' sole reliance on Form 395 will degrade the quality, the fairness, and the value of petitions to deny to the FCC. Broadcasters who don't deserve to be targeted will be targeted mistakenly, and broadcasters who do deserve to be targeted will be skipped mistakenly.

Consequently, the Streamining NPRM would impose considerable new costs and burdens on petitioners to deny by making it far more difficult -- indeed almost impossible -- for petitioners to deny to ascertain and adjudicate instances of gross EEO violations, including intentional discrimination.

7. EEO compliers

As we have noted, the "free rider problem" permits EEO noncompliers or nonperformers -- those who do the minimum necessary to comply, but do nothing to remedy the present effects of past

discrimination -- to derive the fruits of EEO performers' labor while investing no time, effort and money to pay for it. See p. 111 supra. Thus, when an EEO-complying broadcaster trains minorities and women, only to have the trainees leave for jobs with an EEO noncomplier or nonperformer across town, the EEO complying broadcaster may become less motivated to continue its training program.

Furthermore, the absence of good EEO data will inevitably result in more broadcasters having to spend time and effort defending themselves from good faith, but erroneous allegations of discrimination. EEO-complying broadcasters will also find overstrapped community groups less accessible to them, because the community groups will be more heavily engaged fighting discrimination. Discrimination will also discourage talented minorities and women from pursuing careers in broadcasting, thereby depriving all broadcasters of the services of good people.

Eduardo Peña states in his Declaration (Exhibit 10):

> It's unfortunate that in its zeal to eviscerate EEO enforcement, some broadcast trade organizations have not thought about how the existence of meaningful EEO data protects innocent broadcasters from erroneous allegations of discrimination and assists broadcasters in securing a steady flow of qualified job applicants.